United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1287

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FOR THE SECOND CIRCUIT
DOCKET NO. 76-1287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v -

JOSEPH BOSTIC,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
THE SUPPRESSION HEARING	1
ARGUMENT	5
THE POLICE "STOP" OR "INVESTIGATIVE SEIZURE" OF THE APPELLANT VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE IT WAS INITIATED WITHOUT INDIVIDUALIZED REASONABLE SUSPICION OF CRIMINAL ACTIVITY.	
CONCLUSION	19

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BRIEF FOR THE DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

Joseph Bostic appeals from an order of the Eastern District, John R. Bartels, Judge, entered on November 10, 1975, denying his motion to suppress evidence derived from an "investigative seizure." On December 1, 1975, Bostic pleaded guilty to the one count indictment charging him with possession of stolen mail in violation of 18 U.S.C. § 1708, preserving nonetheless the right to appeal on the Fourth Amendment issue. After a January 30, 1976 commitment for study and report pursuant to 18 U.S.C. § 5010 (e), the defendant was sentenced on April 26, 1976, as a young adult offender and committed to the Attorney General for treatment and supervision pursuant to 18 U.S.C. § 5010 (b).

THE SUPPRESSION HEARING

Robert Rodenburg, a New York City patrolman, testified that in consequence of a substantial number of Social Security

checks being stolen from a Ninth Avenue, Boro Park, Brooklyn mail delivery route, he and his partner, Officer Kelly, were assigned to "operation pony express," having as its objective the apprehension of those responsible. [Hear. 5-6] Since such checks are usually delivered to recipients on the third day of each month, on March 3, 1975, Rodenburg and Kelly conducted plainclothes surveillance of the nieghborhood to see if they could nab a thief in the act of pilfering the mail. [Hear. 62, 63] On that day they observed the appellant, a black man, enter and leave about six different apartment buildings between 10 a.m. and 12:30 p.m. [Hear. 6] Occupants of each of the buildings he entered had previously reported missing checks. [Hear. 60] Rodenburg lost the appellant when upon entering another building, he apparently left through a rear door leading into an alleyway. [Hear. 63]

When surveillance resumed the next month on April 3, 1976, Rodenburg once again spotted the appellant on the street. He was carrying a soft black vinyl business case. [Hear. 9] The appellant entered and exited one apartment building and then entered another. Missing checks had been reported by tenants of the second building. [Hear. 8] Believing erroneously that the mail had already been delivered, Rodenburg and his partner pursued the appellant into the building in the hope that they would catch him at the mail slots. [Hear 62, 63] The appellant, however, was nowhere near the mail slots, but in the building vestibule on his way out as Rodenburg and Kelly

stopped him. [Hear. 62] Rodenburg identified himself and demanded an explanation of what he was doing in the building. [Hear. 12] The appellant responded that he was the building's security guard. [Hear. 12] Since it had been previously established through the building's superintendent that no security guard existed, Rodenburg asked for identification. [Hear. 12-13, 23-24] The appellant produced a business card identifying himself as an employee of a security guard company. [Hear. 12, 34] Rodenburg told the appellant that the building employed no guard and asked for better identification. [Hear. 13, 34] To comply, the appellant reached to unzipper his black vinyl case. Before the appellant went any further, Rodenburg, noticing a bulge in the bottom of the case, stopped him from opening it and asked what he had in the bag. [Hear. 14] Appellant's vague and inconclusive response prompted Rodenburg to feel the object through the outside of the bag. It felt like a "long slender object, heavier at one end" and was thought by Rodenburg to possibly be a knife or other sharp tool used to open mail boxes. [Hear. 14, 20, 31] Since for his personal safety Rodenburg would not permit the appellant to go inside his case for identification unless the object was identified, he instructed the appellant to open the briefcase. [Hear. 20, 31, 14,32] The appellant complied and Rodenburg spotted the contents to include a screwdriver with the tip ground to a point, and a Social Security check drawn to Shirley Kleinman. [Hear. 14]

After discovering the check, Rodenburg advised the appellant of his *Miranda* rights and then asked him what he was

doing with another person's check. [Hear. 14] The appellant said it belonged to his girlfriend and that the mailman gave him the check. [Hear. 14, 15] Rodenburg asked if he would be willing to accompanying him to Kleinman's apartment to check out the explanation and the appellant consented. Evidently, two stolen checks from this check recipient's building had been reported, although it is not clear whether either of the officers were aware of this at the time of their interrogation of the appellant. [Hear. 15, 25] When they arrived, no one answered the door. [Hear. 15] A young girl about seven or nine years old who lived in another apartment told Rodenburg, in response to his inquiry, that Shirley Kleinman was an old woman. [Hear. 16]

Joseph Bostic testified that he resided in the neighborhood of Ninth Avenue, Boro Park, Brooklyn and that on April 3, 1975, after he had just walked out of an apartment building located at 4123 Ninth Avenue he was stopped on the street by two police officers. [Hear. 40] The officers forced him back into the building and then demanded to know what he was up to. [Hear. 43] He told the policemen that he had just spoken to the building superintendent about letting an apartment and was told that nothing was available. [Hear. 43] One of the officers then snatched his briefcase and searched the contents which included a Social Security check drawn to Shirley Kleinman. [Hear. 4] The ensuing interrogation and succeeding events were not elicited in deference to defense counsel's repeated Fifth Amendment objections.

Bostic said that although he was unemployed at the time, he had in his possession the business card of his former employer, Dean's Protective Agency. [Hear. 46] On direct he said that he never had been arrested before. However, on cross examination, after vigorous prodding, he admitted to being previously arrested once before in another state although he could not recall with what he had been charged. [Hear. 46-48]

The oral decision, rendered immediately after the testimony, fully endorsed Officer Rodenburg's version of the facts and rejected the defendant's. Describing the case as "rather close," the court concluded that the intrusion fell within the permissible parameters of *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), and other cases cited.

ARGUMENT

THE POLICE "STOP" OR "INVESTIGATIVE SEIZURE" OF THE APPELLANT VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE IT WAS INITIATED WITHOUT INDIVIDUALIZED REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

At the outset it is obvious that the seizure of the screwdriver and the Social Security check from within the appellant's briefcase was not predicated upon a showing of probable cause - below the government and the district judge relied instead upon the less-than-probable cause standards of *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) to justify the officers' authority to stop and detain

appellant, to require him to give account of himself and produce identification and then to conduct a search for weapons.

Since evidence of evil doing on the part of the defendant was not observed before the stop, quite likely the government may now shift for its "stop" justification from *Terry* "reasonable suspicion" to a rationale that eliminates its need as recently articulated by the Supreme Court in *United States v. Martinez-Fuerte* (July 6, 1976, 19 Cr. L. Rep. 3356) and by the New York Court of Appeals in *People v. De Bour*, No. 212 (N.Y. June 15, 1976). Appellant argues that *De Bour* clashes with *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) which denies government officials in highly intrusive circumstances the right to single out an individual for a "stop" in the absence of individualized suspicion, as well as with the rationale of *United States v. Martinez-Fuerte, supra*, that would not justify the "stop" that *De Bour* allowed. Appellant also argues that whatever Fourth Amendment room there may be in light of *United States v. Martinez-Fuerte, supra*, and *People v. De Bour, supra*, for a "stop" of an individual in the absence of individualized suspicion, it does not exist here where, in a routine stolen property investigation the police planned out a broad and uncompelling procedure that would entail a "stop" of a substantial number of innocent individuals under circumstances that would be alarming, humiliating, and potentially dangerous to those accosted.

Terry v. Ohio, supra, teaches that whenever a police officer accosts an individual and restrains his freedom to walk away he has "seized" that person. 392 U.S. at 16. Because, the court noted, such a procedure followed by a "frisk" for weapons performed by a police officer while a citizen stands helplessly by is no petty indignity but a serious intrusion upon the sanctity of the individual which may afflict great indignity and arouse strong resentment, both the "stop" and the "frisk" are subject to the Fourth Amendment requirement that searches and seizures be reasonable.

The standard of "reasonable suspicion" which justifies a "stop and frisk" was formulated by the *Terry* court as unusual conduct which leads the officer "reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. at 30. "Specific and articulable facts," 392 U.S. at 21, which justify a suspicion of criminal activity on the part of the singled out individual must be aired. Thus to guard against the exercise of unbridled police power an objective standard has been established that does not allow for "nothing more substantial then inarticulate hunches." 392 U.S. at 22.

Although the Supreme Court appears in the "stop and frisk" trilogy of *Terry v. Ohio, supra*; *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed2d 917 (1968); and *Peters v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) to have treated both the "stop" and the "frisk" together without treating justification for the "stop" as a distinct issue, the court later devoted separate consideration to the right of government

to "stop" an individual in *Adams v. Williams, supra*; *United States v. Brignoni-Ponce, supra*; and *United States v. Martinez-Fuerte, supra*.

In *Adams v. Williams, supra*, the police officer was told by an individual known to him that the person seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The court approved the stop because the person singled out was reasonably under suspicion:

> A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 146

In *Brignoni-Ponce* border patrol police on roving motor patrol stopped the defendant's automobile near the Mexican border and questioned its occupants about their citizenship and immigration status purely on the basis that the occupants looked to be of Mexican descent. The majority opinion of Mr. Justice Powell noting that *Terry v. Ohio, supra*, expressly declined to decide whether facts not amounting to probable cause could justify an "investigative seizure," 392 U.S. at 19 N16, approved, in the narrow area of border policing, a "brief stop" and inquiry based upon reasonable suspicion that the vehicle might contain illegal aliens:

> ... because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

45 L.ED.2d at 616-617.

Since large numbers of American citizens have the physical characteristics identified with Mexican ancestry, the court ruled against the government.*

> ... Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.
>
> 45 L.Ed.2d at 619-620

In *United States v. Martinez-Fuerte, supra*, the court allowed at "reasonably located checkpoints" what it disallowed to roving border patrols in *Brignoni-Ponce* - a stop in the absence of individualized suspicion and a brief questioning of the vehicle's occupants to determine their right to be in the countr Weighing "the public interest against the Fourth Amendment interest of the individual," 19 Cr. L. Rep. at 3059, the court found the nature and quality of checkpoint stops less intrusive than those of the roving border patrol.

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* It is well established, however, that stops occasioning a routine inspection and search of individuals seeking to cross our borders are justified on the basis of national self-protection and without the need for "reasonable suspicion." See *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924); *Almeida Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973)

> ... This objective intrusion - the stop itself, the questioning, and the visual inspection - also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion - the generating of concern or even fright on the part of lawful travelers - is appreciably less in the case of a checkpoint stop. In *Ortiz*, we noted that
>
> > "the circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. 422 U.S., at 894-895.
>
> 19 Cr. L. Rep. at 3360

Distinguishing further checkpoint stops from those of the disapproved roving patrol, the court emphasized the "regularized manner in which established checkpoints are operated." This would have the salutory effect of minimizing "the grave danger that ... unreviewable discretion would be abused by some officers in the field." 19 Cr. L. Rep. at 3360.

Bearing in mind the broad principles of the *Terry* trilogy; *Adams v. Williams*, *supra*; and *Brignoni-Ponce* that construe the Fourth Amendment to allow an "investigative seizure" where there exists reasonable suspicion that the individual is involved in criminal activity, the question must be put in regard to the case at hand - just what did Bostic do to justify his being singled out, stopped and interrogated in an accusatorial way? The record is empty of any observed

evidence of criminal behavior on his part before the stop. He was not furtive or evasive. The only specific and articulated fact that made him conspicuous, and indeed the only thing he did do in answer to the question was to walk in and out of a number of apartment buildings in a residential metropolitan community on a weekday midmorning and nothing more. New Yorkers, of course, are prone to do such things all of the time in the conduct of their personal and business affairs and have come to accept this liberty of free passage to and fro without having to put up with accusatorial interrogations that require them to prove their innocence of any wrong. Although the record does not reveal how many innocent citizens the civilian-attired Rodenburg and Kelly startled in probably dimly lit Brooklyn halls and vestibules, it is quite possible that there were a substantial number since their strategy was to effect a stop of those who went from place to place.

Having reached that point in argument where the government, to justify the stop in question, may have to show reasons that exempt it from the letter and spirit of *Terry* and its progeny, attention will be directed to the three distinct elements that *Brignoni-Ponce* tells us go into a determination of what is meant by Fourth Amendment reasonableness - the gravity of the intrusion, the importance of the governmental interest, and the extent to which practical alternatives exist to meet the need for action.

The Supreme Court undoubtedly views the gravity of the intrusion as the paramount consideration in the context of a stop for it was on this ground alone that the court denied to the roving patrol what it allowed at reasonably located check-points - stops in the absence of individualized suspicion.

Officers Rodenburg and Kelly were ununiformed. While their civilian attire was not gone into at the hearing, perhaps it was slightly tattered or workingman-like - certainly not official or businesslike - so as not to draw attention to themselves in a low income neighborhood of this kind. The procedure was for them to wait until a target had time to get at the mail slots and then move in. Since a target could prove to be a tenant, logically at his mail box for the morning mail, the procedure entailed the risk of subjecting a tenant in the privacy of his own abode, to the anxiety and fright that attends being suddenly sprung upon by strangers in a probably dimly lit vestibule or hallway. To the innocent tenant or visitor who would be stopped if found regardless of where he or she is seen,* this provocative act created a significant risk of violence and injury since innocent people would be prone to react with suspicions of their own of the strangers' bone fides, and might try to flee from what is conceived to be a mugging trap. Not only will the innocent be frightened but also humiliated and outraged that for no apparent reason, they must justify their right to be present and show that they are up to no wrong. Particularly in low

* Appellant was on his way out the door, nowhere near the mail slots when he was stopped.

income neighborhoods of our City where mutual respect between civilian and policeman is often in a woeful state, the police need the respect of the law abiding citizen in order to perform their legitimate functions. Methods that frighten and humiliate the innocent breed disrespect for the law and only exacerbate the division when obviously it needs mending. Moreover, when police tactics of this sort strike innocent members of minority groups, it only reinforces the minority's belief that they have less liberty than the advantaged majority. Indeed if stops of this kind are permitted, one of the factors that prompt a stop could well be the policeman's prejudice against a particular minority group.

Thus the stop in question was no innocuous imposition or petty intrusion. Because of the totality of circumstances, the stop was far more aggressive, frightening, and mischevious than that of the vehicle in *Brignoni-Ponce* since automobile occupants are quite accustomed to being pulled off the road by marked police vehicles for a variety of non apparent traffic infractions. In short there is less expectation of privacy on the highways than in the building vestibule.*

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* As noted by Mr. Justice Powell in *Martinez-Fuerte*:

> We think the same conclusion is appropriate here, where we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, e.g., *McDonald v. United States*, 335 U.S. 451 (1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. *United States v. Ortiz*, 422 U.S., at 896 n. 2; see *Cardwell v. Lewis*, 417 U.S. 583, 590-591) (1974) (plurality opinion).

19 Cr. L. Rep. at 3360

The importance of the governmental interest and the absence of practical alternatives spoken of in *Brignoni-Ponce* have been a topic of substantial concern on the many occasions this circuit has dealt with the Fourth Amendment validity of broad airport anti-hijack measures. e.g., *United States v. Bell*, 464 F2d 667 (2d Cir. 1972) Cert. Denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972); *United States v. Ruiz-Estrella*, 481 F2d 723 (2d Cir. 1973); *United States v. Albarado*, 495 F2d 799 (2nd Cir. 1974); *United States v. Edwards*, 498 F2d 496 (2nd Cir. 1974). Chief Judge Friendly in *United States v. Bell, supra* at 675, spoke of "a weighing of the harm against the need." Judge Oaks in *United States v. Albarada, supra* at 806 saw "practical alternatives" in this perspective:

> ... it is, and indeed for preservation of a free society must be, a constitutional requirement that to be reasonable the search must be as limited as possible commensurate with the performance of its functions.

Because of these considerations, this circuit permits, as a result of the great threat to life and massive property distruction posed by the constant threat of aircraft hijack, warrantless magnetometer searches against all embarking passengers at least where advanced notice has been given on the ground that they represent a minimal and inoffensive intrusion. *United States v. Albarado, supra; United States v. Edwards, supra.* But despite the pressing need acknowledged,

this circuit does not permit the standard search or "frisk" in the absence of probable cause or *Terry*-type reasonable suspicion. *United States v. Ruiz Estrella, supra.*

In the instant case the officers from the Brooklyn precinct were going after a common thief. Presented here is routine crime that can be dealt with adequately in routine ways that do not compel the elimination of reasonable suspicion. Practical alternatives existed to the course pursued which would have limited the "seizures" in the given investigation to the probably guilty and left the innocent alone. For example, one good way of catching a thief in the act of pilfering the mail slots is to secretly position oneself near the slots where all the action is and carefully observe what occurs.

Since routine crime and practical alternatives exist no departure from *Terry* reasonable suspicion is warranted.

This circuit has passed upon the stop authority of the police in a number of cases and never has it sanctioned stops on less than reasonable suspicion. Plentiful suspicion existed in the narcotics investigation cases. *United States v. Santana*, 485 F2d 365 (2nd Cir. 1973); *United States v. Riggs*, 474 F2d 699 (2nd Cir. 1973). In the illegal alien investigation case of *United States v. Salter*, 521 F2d 1326 (2nd Cir. 1975)

the obviously untruthful response of a black woman in a heavy Jamaican accent that she was born in "Boofalo" furnished reasonable suspicion to justify a brief interrogation of the person who had accompanied her. In *Ojeda-Vinales v. Immigration and Naturalization Service*, 523 F2d 286 (2nd Cir. 1975), the petitioner was targeted as an illegal alien by an informant.

Three street "stop" cases involving property theft have been found but they were decided before the Supreme Court began to crystallize its "stop" law: *United States v. Thomas*, 396 F2d 310 (2nd Cir. 1968); *United States v. Brady*, 421 F2d 681 (2nd Cir. 1970); *United States v. Price*, 441 F2d 1092 (2nd Cir. 1971). A strong argument could be made that in each of these cases the "seized" defendants were carrying packages under circumstances that was quite suspicious.

People v. De Bour, No. 212 (N.Y. June 15, 1976), which may be argued in support of the government's position, raised the question "whether or not a police officer, in the absence of any concrete indication of criminality, may approach a private citizen on the street for the purpose of requesting information," Slip. Op. p 1, and answered in the affirmative. The case involved two foot patrolmen who while walking together on their beat shortly after midnight noticed someone walking in their direction on the same side of the street. About forty feet beofre they met, the defendant crossed to the other side of the street. The two officers followed suit

and when they reached the defendant, asked him what he was doing in the neighborhood. The defendant responded that he had just parked his car and was going to a friend's house. The officer then asked for identification and as the defendant answered that he had none, the officer noticed a slight waist-high bulge in his jacket. The defendant was ordered to unzipper his jacket and a revolver was observed protruding from his waistband. Basically on these facts, the court sustained the stop and eventual search. Judge Wachtler decided that the encounter was "devoid of harrassment or intimidation," Slip Op. p 10, and in view of that held that the police were entitled to pursue their hunch as it was predicated not on whim or caprice but on the fact that the incident "occurred after midnight in an area known for its high incidence of drug activity, Slip Op. p 10.

In its balancing of "the harm against the need," the *De Bour* court does not explain why non suspicious pedestrians should be implicated as narcotics possessers in view of the ease with which on probable cause these highly visible violators can be discovered on city streets. Essentially, *De Bour* allows on New York streets what is denied to government on the public highways - stops by roving police patrols absent reasonable suspicion; "seizures" that in the night take citizen by surprise and that engender fear, alarm, and humiliation. The New York Court of Appeals has whittled down the liberties of all New Yorkers; restricted our free

passage through our streets to the level that we must now submit for any reason to the command - stop - show us that you are innocent - give us identification - tell us what is in your bulging pockets.

The sweeping police power authorized in *De Bour* is limited, however, to stops that do not involve "actual or constructive restraint," Slip Op. p 5. The nature of the crime, attending circumstances and the stop's manner and intensity are all factors to determine whether a given case falls within its ambit, Slip Op. p 11. Here the stop of the civilian in the building vestibule by ununiformed police could hardly come within *De Bour*'s embrace. Its intensity surpasses that which occurred in *De Bour* where in an orderly way foot patrolman approached civilian. Larceny, the crime involved, is less serious than narcotics, and attending circumstances would more likely cause fright, possible injury and humiliation to the person accosted.*

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*If the court finds that the stop is authorized then the search of the defendant's briefcase that came about, according to the District Judge's findings, as a result of a weapons frisk, is apparently justified under Second Circuit principles that implement *Terry* and *Adams v. Williams, supra.* If Rodenburg was entitled to stop Bostic then he was entitled to demand identification. *United States v. Salter, supra.* Since the identification produced, a business card identifying Bostic as a security guard, was not satisfactory in light of the officer's knowledge that the building had no security guard as claimed, the officer was entitled to better identification. *United States v. Riggs, supra.* Since the defendant had to reach inside his briefcase which protruded with an object that by now the officer suspected was a tool to open mail slots that could also be used as a weapon, the officer was entitled to protect himself from harm and look inside. His "plain view" observation of the check would then be justified. *United States v. Riggs, supra.*

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE EVIDENCE SEIZED SUPPRESSED.

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